

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

COLUMBUS W. NEAL)	
Claimant)	
)	
VS.)	
)	
HY-VEE, INC.)	
Respondent)	Docket No. 217,766
)	
AND)	
)	
HAWKEYE SECURITY INSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed Administrative Law Judge Robert H. Foerschler's Award dated May 14, 2001. The Board heard oral argument on October 16, 2001, in Kansas City, Kansas.

APPEARANCES

Claimant appeared by his attorney, James E. Martin of Overland Park, Kansas. Respondent and its insurance carrier appeared by their attorney, Mark E. Kolich of Kansas City, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

A recitation of the history of this case is necessary. It was stipulated claimant suffered a work-related injury on November 2, 1996. The Administrative Law Judge awarded claimant an 8 percent permanent partial general body disability on October 27, 1999.

Respondent and its insurance carrier (respondent) filed a timely request for review by the Board and raised two issues. First, respondent contended benefits should be suspended because claimant, who is incarcerated in a prison facility in Cameron, Missouri, failed to attend a medical appointment scheduled by respondent. Respondent further argued benefits should be denied because claimant presented no evidence to establish his average weekly wage.

The Board issued its decision on April 19, 2000, and remanded the case to the Administrative Law Judge for further proceedings. Because respondent had failed to provide any payroll records as required by K.A.R. 51-3-8(c), the Board concluded that in the interests of justice the matter should be remanded to allow claimant a reasonable time to introduce evidence of the average weekly wage. The Board further determined claimant's inability to appear for a medical examination did not amount to willful conduct sufficient to warrant suspension of benefits pursuant to K.S.A. 44-518.

The respondent appealed the Board's April 19, 2000, decision to the Court of Appeals. On October 4, 2000, the Court of Appeals dismissed the appeal as interlocutory.

On May 14, 2001, the Administrative Law Judge entered his second Award which again determined claimant suffered an 8 percent permanent partial general body disability.

The respondent requested review of the May 14, 2001, Award and again argues an award of compensation should have been denied because claimant initially failed to prove his average weekly wage and the Board erred remanding the case for additional evidence on that issue. Respondent further argues the claim for compensation should have been suspended pursuant to K.S.A. 44-515 and K.S.A. 44-518 because claimant's incarceration in Missouri prevented an evaluation by a physician of respondent's choice.

Conversely, claimant argues the Board should affirm the Administrative Law Judge's second Award of May 14, 2001.

FINDINGS OF FACT

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant suffered a compensable low back injury at work on November 2, 1996, and filed an application before the Director on November 14, 1996. Respondent provided medical treatment with Jeffrey MacMillan, M.D., and paid what was described at the Regular Hearing as temporary total disability benefits. Respondent later advised these were temporary partial disability benefits.

During the pendency of these proceedings, claimant was convicted of or pled guilty to crimes, including murder, and was sentenced to two life terms. On June 12, 1998, while claimant was in the Jackson County Jail, Daniel D. Zimmerman, M.D., evaluated claimant's injury at the request of claimant's counsel. Dr. Zimmerman later testified in his opinion claimant has an 8 percent functional impairment to the whole person as a result of his compensable injury.

In November 1998, claimant was transferred to the correctional facility in Cameron, Missouri. Respondent then scheduled an examination of claimant with Michael J. Poppa, M.D., for December 29, 1998. The examination was scheduled at Dr. Poppa's office. Dr. Poppa stated he would not go to the Cameron facility for the examination. Counsel advised that correctional authorities would not allow claimant to attend the examination at Dr. Poppa's office.

On December 30, 1998, after claimant failed to appear for the examination, respondent moved for an order, pursuant to K.S.A. 44-518, suspending the proceedings until such time as claimant made himself available for examination. The Administrative Law Judge did not, at that time, suspend the proceedings. Instead, as part of the Award, the Administrative Law Judge ruled that benefits should be suspended as of the date claimant failed to appear for the examination by Dr. Poppa. The Administrative Law Judge further held, however, that since all benefits were payable before the date of that scheduled examination, the suspension did not change the benefits respondent owed claimant.

Neither party introduced evidence of claimant's average weekly wage.

As previously noted, the Administrative Law Judge entered an Award dated October 27, 1999. On review, the Board remanded the case back to the Administrative Law Judge for further proceedings on April 19, 2000.

On remand before the Administrative Law Judge, the parties stipulated claimant's average weekly wage was \$462.18. But respondent reserved its argument that compensation should be denied because claimant failed to prove his average weekly wage during the initial trial.

Kip Kubin, a workers' compensation attorney licensed in the state of Kansas and Missouri, testified on respondent's behalf that the usual and customary fee for an independent medical examination is between \$350 and \$800.

A letter from P. Brent Koprivica, M.D., indicated it would be impossible for the doctor to travel to Cameron, Missouri to evaluate claimant. Dr. Koprivica further indicated he would charge \$5,000 plus travel expenses if he were to schedule an entire day to evaluate an incarcerated individual. A letter from Edward J. Prostic, M.D., indicated he was

unavailable for two months and that such examination would require a full day out of the office. Dr. Prostic indicated the cost for such examination would be \$3,000.

Respondent did not schedule an examination of claimant at the prison and the matter proceeded to the second Award dated May 14, 2001, which again determined claimant suffered an 8 percent permanent partial general body disability. The Administrative Law Judge computed the second award using the stipulated average weekly wage.

CONCLUSIONS OF LAW

Claimant has the burden of proving his right to an award of compensation and of proving the various conditions on which that right depends.¹

The Board concludes claimant's failure to appear at the appointment scheduled with Dr. Poppa should not operate to suspend claimant's right to benefits. The relevant statutes are K.S.A. 44-515 and K.S.A. 44-518. K.S.A. 44-515 requires a claimant to submit to examination at a "reasonable time and place." K.S.A. 44-518 provides that if the claimant "refuses" to submit to examination or "unnecessarily obstructs or prevents" such examination, the employee's right to payment is suspended until the claimant submits and the examination is completed. Respondent argues claimant has refused to submit and has unnecessarily obstructed or prevented examination at a reasonable time and place. Claimant has, according to respondent, by his conduct placed himself in a position where he cannot attend the examination and this should be treated as a refusal or unnecessary obstruction. Claimant argues that his failure to appear should not be considered a refusal or unnecessary obstruction because he had no choice at the time.

The Board finds no Kansas appellate court decision on point. We do find decisions from other states. Delaware and Nevada have both held failure of an incarcerated claimant to appear for medical examination should not be treated as a refusal because claimant has not willfully or intentionally failed to appear.² Pennsylvania, on the other hand, has held that the claimant has no right to force the respondent to make special arrangements to accommodate incarceration.³

The Board concludes that under the circumstances of this case, claimant did not refuse to submit to an examination. In addition, in this case a reasonable time and place would have been the correctional facility in Cameron, Missouri. The terms "refusal" and

¹K.S.A. 44-501(a).

²*Foraker v. NVF Company*, 358 A.2d 730 (Del. Super. 1976); *State Industrial Insurance System v. Campbell*, 109 Nev. 997, 862 P.2d 1184 (1993).

³*Raymond v. Workers Compensation Appeals Board*, 659 A.2d 657 (Pa. Cmwlth. 1995)

“unnecessarily obstructs” carry with them an element of willfulness or intent. Claimant did not decide not to go to the examination, he could not go. The Board is unwilling to treat incarceration for the prior criminal act as a substitute for the act of refusing to attend the examination.

Under the circumstances, the prison facility in Cameron, Missouri, would have been the reasonable place for the examination. The record indicates respondent initially asked one physician to go to the facility. When he refused, respondent made no further effort to arrange for an examination. Upon remand of the matter, the respondent contacted two physicians and one refused to go to the facility and the other was not able to schedule such an all day appointment for two months. The fee for such examination would be \$3,000.

The Board concludes the respondent has not established it is unreasonable to arrange for an examination of claimant at the prison facility. The respondent did not attempt to locate qualified physicians closer to the prison facility in Missouri to conduct an examination of the claimant. Such local physicians would certainly not require the entire day that the two physicians respondent contacted required. In addition, competent medical testimony can be established by a physician without examining the claimant. A physician can review the claimant’s medical records and under the Fourth Edition of the AMA Guides offer an opinion on claimant’s functional impairment, if any.

Respondent next argues the Board erred remanding the case to the Administrative Law Judge in order to allow claimant to introduce evidence of his average weekly wage.

Claimant offered no evidence of his average weekly wage. Claimant did not testify to the amount of his wage and did not otherwise offer evidence of the wage. At the beginning of the Regular Hearing, the Administrative Law Judge stated the average weekly wage had been discussed at the prehearing conference but no agreement reached. The Administrative Law Judge also stated what had been alleged:

There was no agreement, however, about average weekly wage although it was alleged that Mr. Neal’s wages were \$11.30 an hour plus overtime and a suggestion of \$440 for the wage was made, but not agreed to. He was, however, paid about three weeks of temporary total disability totalling \$983.12 and was not claiming any adjustable or any additional weekly benefits

K.A.R. 51-3-8(c), a regulation relating to pretrial procedures and stipulations, states that a respondent must be prepared to admit all facts the respondent cannot justifiably deny and must have payroll records available in a form to answer questions that might arise about the wage. Respondent did not offer payroll records or give any indication at Regular Hearing that it had records available as required.

On review from the initial Award, the Board concluded that, in the interest of justice, this case should be remanded for further proceedings. The respondent did not comply with K.A.R. 51-3-8(c) because it did not provide payroll records. Furthermore, at the Regular Hearing respondent did not give a reason as to why it was refusing to stipulate to the average weekly wage alleged and did not make a statement in the record as to what average weekly wage it was alleging. In some cases it would be reasonable to rely on claimant's allegation regarding wage where respondent fails to provide records. In this case, however, it is not entirely clear what the allegations were. At the beginning of the Regular Hearing, the Administrative Law Judge simply says there has been a "suggestion" of \$440 per week. But he also says it was alleged the wage was \$11.30 per hour plus overtime. This would not match the \$440 if claimant worked a 40-hour work week as a full-time employee. Claimant's submission letter says claimant alleges \$11.30 per hour plus overtime for a wage of \$440 but, again, the letter does not explain how \$11.30 per hour plus overtime yields the \$440. In short, the record does not clearly establish what claimant is alleging.

The Board also concludes statements by counsel regarding what temporary total disability benefits have been paid are not a statement about the amount of the wage. In this case, the statement at the Regular Hearing was only that the payments were for approximately three weeks. Counsel later advised this was temporary partial, not temporary total, disability benefits. But even if the statement were more specific, the statement was not a stipulation as to the average weekly wage or even the appropriate compensation rate.

K.S.A. 44-551(b)(1) grants the Board the authority to remand any matter to the Administrative Law Judge for further proceedings. Because respondent failed to comply with K.A.R. 51-3-8(c) and provide a wage statement, payroll information, or even state its position on average weekly wage, the Board concluded the case should be remanded and claimant allowed a reasonable time to introduce evidence of the average weekly wage. Such remand is contemplated by statute and was required in this case in the interests of justice and by respondent's failure to comply with the regulation.⁴

Based upon a review of the evidentiary record, the Board concludes the claimant has met his burden of proof to establish he suffered an 8 percent permanent partial impairment of function based upon Dr. Zimmerman's opinion. Accordingly, the Administrative Law Judge's Award is affirmed to the extent it is not inconsistent with the foregoing.

⁴See also *Johnson v. General Motors Corporation*, 199 Kan. 720, 723, 433 P.2d 585 (1967), in which the Court stated the public has an interest in the outcome of workers compensation proceedings.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated May 14, 2001, is affirmed to the extent it is not inconsistent with the foregoing.

IT IS SO ORDERED.

Dated this _____ day of July 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissent from the opinion of the majority. Workers compensation proceedings have been and remain adversarial proceedings.⁵ In a workers compensation proceeding, the claimant has the burden of proof to establish the right to an award of compensation and to prove the various conditions on which the claimant's right depends.⁶ The burden of proof is "the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁷

The parties stipulate to issues not in dispute and the remaining disputed issues require the presentation of evidence. All the evidence is presented to the Administrative

⁵Roberts v. J.C. Penney Co., 263 Kan. 270, 281, 949 P.2d 613 (1997).

⁶K.S.A. 44-501(a).

⁷K.S.A. 44-508(g).

Law Judge. K.S.A. 44-523 provides for establishment of terminal dates for completion of the submission of evidence. After the parties have fully submitted the evidence, the Administrative Law Judge issues a decision based on the record.

The Kansas Bar Association, Kansas Workers Compensation Handbook, Fourth Edition, contains the admonition: "The cardinal rule is: 'Present all necessary evidence on all issues to the administrative law judge.'" Page 13-7. Although the Board conducts a de novo review, it is solely on the record made before the administrative law judge.⁸

In this case the claimant did not present evidence on the disputed issue of his average weekly wage. Although K.A.R. 51-3-8(c) states respondent should have payrolls available to answer questions that might arise as to the average weekly wage, the record is devoid of any explanation why such information was not provided or that any inquiry was made of respondent regarding such information. Had the Administrative Law Judge ordered respondent to provide the wage information, then the majority action in remanding for such information would have been appropriate. However, in this instance there was no such order and no indication why the information was not provided.

The claimant was not without remedy. It is a common practice for the Administrative Law Judges to admonish respondents, in circumstances such as this, that claimant's uncontradicted testimony regarding average weekly wage will be adopted. Because the average weekly wage was a disputed issue, the claimant also could subpoena such records from respondent or obtain an order from the Administrative Law Judge requiring production. Herein, claimant did not avail himself of any of the foregoing procedures and failed to testify regarding the amount of his average weekly wage. Such failure should have resulted in a denial of compensation for failure to meet the burden of proof on an essential element of the case. The calculation of the award is based upon the average weekly wage. There is no way to award compensation without a determination of the average weekly wage.

Although the Board has authority to remand a case to the Administrative Law Judge, such remand should not be used to allow a party a second chance to present evidence on a disputed issue. Such a second chance eliminates any semblance of an adversarial proceeding and removes the Board from making an impartial determination based on the facts presented to the Administrative Law Judge.

The majority erred by remanding this case, after the evidence had been fully submitted by the parties, for additional evidence on a clearly disputed issue. The undersigned would deny compensation based upon claimant's failure to meet his burden of proof on the disputed issue of the claimant's average weekly wage.

⁸ K.S.A. 44-555c(a).

The undersigned further respectfully dissent from the majority's determination that the claim should not be suspended because of claimant's failure to comply with respondent's request that he submit for an examination.

K.S.A. 44-518 provides that if the employee refuses to submit to an examination upon request of the employer or if the employee unnecessarily obstructs or prevents such examination, the right to compensation is suspended until such examination is completed.

The percentage of functional impairment is an essential element in the determination of the compensation an injured worker will receive. The respondent's opportunity to present rebuttal evidence on an essential element of this workers compensation claim has been unnecessarily obstructed. The procedure adopted by the majority obstructs the respondent's statutory right to obtain and present rebuttal medical evidence from a physician of respondent's choice on the extent of claimant's impairment.

The majority conclude the respondent could obtain an examination of claimant by arranging for a physician to examine the claimant at the penal institution. Upon remand additional evidence was proffered that indicated respondent was unable to arrange such examination with doctors of respondent's choice. In addition, the doctor's fee requirements, if they were able to travel to the penal institution and examine claimant, were prohibitively excessive.

Is the claimant's incarceration a legitimate reason for noncompliance with the request for examination? Does such incarceration require the respondent to pay an increased fee necessitated by the added time it would take for a physician to travel to the penal institution to conduct the examination?

K.S.A. 44-515 requires the claimant submit to a medical examination at any reasonable time and place. It seems logical to conclude that a reasonable place would be at the physician's office or medical facility. The employer's responsibilities identified in the statute do not include making special arrangements and paying increased fees to facilitate an examination if a claimant is incarcerated and cannot submit to an examination at the doctor's facility. Failure to attend the scheduled medical examination is without reasonable cause or excuse. The reason why claimant is unable to comply with the provisions of the Act was incarceration, not circumstances beyond claimant's control.

The burden is on the claimant to request transfer to the location of the examination and, until he can comply with the legitimate request to submit for examination, K.S.A. 44-518 would require that a decision on the case be suspended. Until claimant can comply, the case is simply placed on the inactive docket, without any loss of the right to conclude the proceedings when the claimant can make the appropriate arrangements to comply or is able to comply with the statutorily authorized request to submit for examination. There

are many disadvantages in being incarcerated. One is the limitation on the ability to conduct personal business.⁹

The undersigned further disagree that claimant did not willfully or intentionally fail to appear for his examination. Claimant exercised his will to commit a crime and subject himself to a potential loss of his personal freedom. The claimant's actions obstructed the performance of the medical examination which should suspend his right to pursue his workers compensation claim.

Accordingly, respondent is entitled to a suspension of the claim where the incarcerated claimant is unable to submit to the medical examination due to his incarceration and not due to any reasonable excuse or cause.

Lastly, this is not a situation where claimant is incarcerated awaiting trial. The undersigned would concede involuntary incarceration prior to conviction should not constitute refusal or obstruction. Such a finding prior to determination of guilt would ignore the presumption of innocence until proven guilty.

BOARD MEMBER

BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Mark E. Kolich, Attorney for Respondent
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Workers Compensation Director

⁹Brown v. Maloney, 24 Kan. App.2d 424, 945 P.2d 424 (1997); see also *In re J.L.D.* 14 Kan. App.2d 487, 794 P.2d 319 (1990).